

1985

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Recommended Citation

J. Bret Treier, *Appealability of District Court Orders Granting or Denying Stays of Arbitration under 28 U.S.C. Section 1292(a)(1)*, 36 Case W. Res. L. Rev. 122 (1985)

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Appealability of District Court Orders Granting or Denying Stays of Arbitration under 28 U.S.C. Section 1292(a)(1)

Erratum

U.S.C. section incorrect in table of contents and first page of article. The correct U.S.C. citation is 28 U.S.C. section 1292(a)(1).

APPEALABILITY OF DISTRICT COURT ORDERS GRANTING OR DENYING STAYS OF ARBITRATION UNDER 28 U.S.C. SECTION 1291(a)(1)

The question of federal appellate jurisdiction over grants and denials of stays of arbitration has precipitated a split among the circuit courts of appeals. Three distinct approaches have been proposed to evaluate whether section 1292(a)(1) confers jurisdiction. One approach advocates uniform nonappealability. Another solution adopts blanket appealability. The third and most popular rule is a hybrid. In this Note, the author urges that the rule of blanket appealability best effectuates the statute and the policy underlying it. The statute has a clear purpose and meaning which does not support an independent judicial balancing of policy concerns.

INTRODUCTION

FEDERAL APPELLATE jurisdiction is premised on the concept of finality. This concept has its roots deep in the history of our judicial system,¹ and is embodied in section 1291 of the Judiciary Code.² Section 1291 grants the courts of appeals "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be held in the Supreme Court."³ The Supreme Court has interpreted this language as permitting appeals only when a decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."⁴ Judicial efficiency is the widely acknowledged justification for the rule; to permit immediate appeals of every order rendered by a district

1. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 84-85, first codified the rule of finality. The Act permitted appeal from final judgments and decrees both at law and in equity. *Id.* at 83-85, 85-87. The provisions in the Act were based on English common law requirements that final disposition of an entire controversy must occur before permitting writ of error. See *Metcalf's Case*, 11 Co. Rep. 38a, 77 Eng. Rep. 1193 (K.B. 1614). 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3906, 425-26 (1976).

2. 28 U.S.C. § 129 (1982).

3. *Id.*

4. *Catlin v. United States*, 324 U.S. 229, 233 (1945). Other cases have followed this basic formula, examining whether only ministerial tasks, such as execution of judgment, remain to be performed. *E.g.*, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947). The concept of "finality" is hardly concrete, however. See *United States v. 243.22 Acres of Land*, 129 F.2d 678, 680 (2d Cir.), *cert. denied sub nom. Lambert v. United States*, 317 U.S. 698 (1942), *rev'd on other grounds*, *Catlin v. United States*, 324 U.S. 229, 232 n.6 (1944) (" 'Final' is not a clear one-purpose word; it is slithery, tricky There is, still, too little finality about 'finality.' ").

court during litigation would be inefficient.⁵

The finality rule, however, does not, and should not, bar all appeals except those from final decisions. In certain situations, a party could potentially suffer irreparable harm if appeal is barred pending final judgment. Disallowing appeals in such cases would impose an injustice on those parties.⁶ This concern is statutorily acknowledged through exceptions which have been promulgated to allow interlocutory appeals in exceptional circumstances. These exceptions, contained in 28 U.S.C. § 1292(a),⁷ are interpreted as an attempt to balance "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other."⁸

This Note examines one particularly troublesome application of section 1292(a)(1): whether grants or denials of motions to stay arbitration are "injunctions" within the meaning of section 1292(a)(1) and thus appealable as interlocutory orders. Section 1292(a)(1) allows circuit court jurisdiction over "[i]nterlocutory orders of the district courts . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be held in the Supreme Court."⁹ Because "injunctions" take many different forms, the courts of appeals have experienced difficulty interpreting the section 1292(a)(1) exception.¹⁰ The appealability of these court orders must be distinguished from the appealability of a grant or denial of a stay of court proceedings pending arbitration. The latter are authorized by section 3 of the Federal Arbitration Act.¹¹ The

5. See Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932); Note, *Interlocutory Appeal of Orders Granting or Denying Stays of Arbitration*, 80 MICH. L. REV. 153, 156 (1981) [hereinafter cited as Note, *Appeal of Arbitration Orders*]; 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, at § 3907, 429 ("Postponement of the availability of review, as required by the final judgment rule, rests on a conclusion that far greater waste would result from immediate review of every ruling that might ultimately be reversed on appeal.").

6. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 101, 698 (4th ed. 1983) ("It is not feasible to bar all appeals save from final decisions. In some cases important rights of a party will be irremediably destroyed if he is unable to secure prompt review.").

7. 28 U.S.C. § 1292(a) (1982).

8. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (citing *Dickinson* for the competing considerations underlying all finality questions); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) (same); Note, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239 (1947).

9. 28 U.S.C. § 1292(a)(1) (1982).

10. See *infra* note 20 and accompanying text.

11. 9 U.S.C. §§ 1-14 (1982).

Enelow-Ettelson doctrine, which compels an inquiry into whether the underlying action is legal or equitable, governs their appealability.¹²

The question of appealability of orders concerning stays of arbitration arises when a district court has either granted or denied a motion to stay arbitration, and one party appeals the validity of the order. Typically, the case begins as a contract dispute between two

12. Pursuant to the Federal Arbitration Act, a court is permitted to stay its own proceedings pending arbitration. *Id.* § 3. The grant of a motion to stay proceedings under § 3 has the same practical effect as denial of a motion to stay arbitration, since the losing party in each instance must arbitrate. Therefore, it might seem that the appealability of both types of court orders would be analyzed similarly. Instead, the appealability of stays of arbitration is analyzed under § 1292(a)(1) while the appealability of § 3 orders is governed by the *Enelow-Ettelson* doctrine.

The *Enelow-Ettelson* doctrine had its beginnings in *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). The statement of the rule which is accepted by most courts today is as follows:

An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order is made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counterclaim.

Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962) (emphasis in original).

The rule's applicability turns on whether the claim being litigated is legal or equitable in nature. The theory behind the distinction is that "the stay, if sought of a law action, is analagous to a chancellor enjoining proceedings in the law court, a separate forum, whereas a stay of an equitable action represents merely an ordering of judicial business in a single proceeding in equity." *Travel Consultants, Inc. v. Travel Management Corp.*, 367 F.2d 334, 337 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). Though the basis for this distinction disappeared with the merger of law and equity, the Court reaffirmed the rule in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). The Court there found that the unification of law and equity under the Federal Rules of Civil Procedure had no effect because § 1292(a)(1) looks "to the substantial effect of the order" and not to its form. *Id.* at 192.

The doctrine creates anomolous results. An appeal from an order on a motion to stay a legal action pending arbitration will be taken, but an appeal from a stay motion in an equitable proceeding pending arbitration will not be heard. The procedural effect of each order is the same, but the results are different.

Because of the fictional analogy to courts of equity power, and the anomolous results, the doctrine is much maligned. It has been widely criticized by commentators and even by the Supreme Court. *See, e.g.*, C. WRIGHT, *supra* note 6, at § 102, 710; H. HART & H. WECHSLER, *THE FEDERAL COURTS* 1564 (2d ed. 1977); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955). Although the Court in *Baltimore Contractors* expressed strong discomfort with the doctrine, it thought that any change in the well-established precedent would have to come from Congress and, therefore, applied the doctrine in its accepted form. *Id.* at 184-85.

The *Enelow-Ettelson* doctrine generally has not been applied to orders involving stays of arbitration. *See, e.g.*, *Stateside Mach. Co. v. Alperin*, 526 F.2d 480, 483 (3d Cir. 1975); *Bufler v. Electronic Computer Programming Inst.*, 466 F.2d 694, 696 (6th Cir. 1972). *Contra Whyte v. THinc Consulting Group Int'l*, 659 F.2d 817, 819 (7th Cir. 1981). *But see Mathy, The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration*, 63 MARQ. L. REV. 34 (1979) (arguing that *Enelow-Ettelson* applies to arbitration stay orders).

parties, in which the underlying contract contains an arbitration clause.¹³ Such clauses are common in collective bargaining labor agreements,¹⁴ and are also found in many business contracts.¹⁵ Thus, the parties have contractually agreed to resolve certain disagreements through arbitration; however, when a dispute occurs and one of the parties initiates arbitration under the contract, the other party might maintain that the arbitration clause is inapplicable and commence litigation.¹⁶ The party which initiated litigation then moves that the court stay the arbitration proceedings on the basis that the dispute is nonarbitrable under the contract.¹⁷ If the court grants the stay, the party seeking arbitration will appeal.¹⁸ Alternatively, if the court denies the motion, the party seeking to avoid arbitration will appeal.¹⁹ The appellate court must then determine whether the grant or denial of a stay of arbitration is appealable as a grant or denial of an injunction under section 1292(a)(1).

The various courts of appeals have disagreed sharply on the rules and rationales for allowing or denying appeal.²⁰ One approach is blanket nonappealability. Under this rule, neither orders denying nor orders granting stays are appealable.²¹ The second approach is directly opposed to the first—holding that both denials and grants of stays are appealable as a matter of right.²² The third solution is a hybrid, dictating that orders which deny stays of arbi-

13. See, e.g., *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363, 364-65 (6th Cir. 1984) (dispute concerning plaintiff's refusal to pay defendant commissions for obtaining foreign military contracts for plaintiff); *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1420 (9th Cir. 1984) (dispute concerning performance of contract under which defendant was to design and manufacture telephone equipment for plaintiff).

14. See, e.g., *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515, 517 (7th Cir. 1984) (in second of two consolidated cases, No. 83-3310, union sued company under § 301 of Taft-Hartley Act for breach of collective bargaining agreement, seeking to compel arbitration).

15. See, e.g., *North Supply*, 728 F.2d at 365 n.2; *Alascom*, 727 F.2d at 1420.

16. See, e.g., *Buffler*, 466 F.2d at 695 (plaintiff received "Demand for Arbitration" from defendant and filed complaint in federal district court alleging defendant's contractual violations).

17. *Id.*

18. *Id.* at 696.

19. See, e.g., *North Supply*, 728 F.2d at 364 (plaintiff appealed from district court order denying its motion for stay of arbitration); *Timberlake*, 729 F.2d at 517 (defendant in first of two consolidated actions appealed from district court denial of motion to stay arbitration).

20. See, e.g., *Timberlake*, 729 F.2d at 517. The court there consolidated two cases on appeal "to address recurrent issues of appealability that are a source of understandable confusion to the bar." *Id.*

21. The Second, Third, and Eighth Circuits appear to have taken this position. See *infra* notes 27-79 and accompanying text.

22. The Fifth, Ninth, and Eleventh Circuits have apparently adopted this approach. See *infra* notes 80-116 and accompanying text.

tration are not appealable, but orders granting such stays are appealable.²³ There has been no Supreme Court pronouncement regarding this issue,²⁴ although the Court has had several opportunities to resolve the dispute.²⁵

All three approaches will be examined in this Note, with emphasis on the governing statute, various policy concerns, and general precepts of federal jurisdiction. The Note concludes by supporting the view that both grants and denials of stays of arbitration are appealable as a matter of right under section 1292(a)(1).²⁶

I. THE CIRCUITS DIVIDE

A. No Appealability Under Section 1292(a)(1)

1. The Second Circuit Leads the Way

In a series of decisions, the Second Circuit has adopted the rule that an order granting or denying a stay of arbitration is not appealable under the section 1292(a)(1) exception.²⁷ While several circuits have voiced approval of the rule of blanket nonappealability,²⁸

23. The First, Sixth, and Seventh Circuits adopt this view. See *infra* notes 117-63 and accompanying text. While this approach has recently gained in popularity, see *North Supply*, 728 F.2d at 368; *Timberlake*, 729 F.2d at 519; cf. *Alascom*, 727 F.2d at 1422, this Note adopts the view that the hybrid solution is incorrect. See *infra* notes 164-96 and accompanying text.

24. One commentator and several courts, however, have determined that *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), which interpreted § 1292(a)(1) in another context, governs the analysis of appealability with regard to stays. See Note, *Appeal of Arbitration Orders*, *supra* note 5, at 168-75; *Alascom*, 727 F.2d at 1422. For a discussion of *Carson*, see *infra* notes 92-93, 101-05 and accompanying text.

25. The Supreme Court has denied certiorari several times in cases specifically dealing with this issue. E.g., *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied sub nom. Dawson v. Lummus Co.*, 368 U.S. 986 (1962); *Diematic Mfg. Corp. v. Packaging Indus.*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975); *Helfenbein v. International Indus.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971).

26. See also Dyk, *Appealability of Interlocutory Orders Enjoining or Refusing To Enjoin Commercial Arbitration*, 69 Ky. L.J. 827 (1981). The author argues that appealability is the better alternative because Congress did not intend that an irreparable injury standard apply to § 1292(a)(1). *Id.* at 837. Congress instead created a uniform rule by enacting § 1292(a)(1), which it has amended several times to broaden the category of appealable injunctive orders. *Id.* at 837 nn.48-49 and accompanying text. Further, the author notes that *ex parte* arbitration proceedings, which allow arbitration to proceed in the absence of the protesting party, were not contemplated by Congress when it enacted the United States Arbitration Act ("USAA"). *Id.* at 830. Thus, though the USAA may serve as evidence of a federal policy favoring speedy resolution through arbitration, it "offers no clearly articulated policy against appealability of decisions granting or denying injunctions against arbitration." *Id.* at 839.

27. *Diematic Mfg. Corp. v. Packaging Indus.*, 526 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975); *Greater Continental Corp. v. Schechter*, 422 F.2d 1100 (2d Cir. 1970); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied sub nom. Dawson v. Lummus Co.*, 368 U.S. 986 (1962).

28. See *infra* text accompanying notes 49-68.

only the Second Circuit has expressly held that both denials and grants of stays are not appealable.

The initial decision of the series was *Lummas Co. v. Commonwealth Oil Refining Co.*²⁹ There, the Second Circuit refused to hear an appeal of an order granting a stay of arbitration on the grounds that such orders are not injunctions to which the section 1292(a)(1) exception applies.³⁰ In an opinion authored by Judge Friendly, the Second Circuit interpreted section 1292(a)(1) in accordance with its view of the underlying policy considerations. While acknowledging that Congress fashioned the section 1292(a)(1) exception so that litigants may avert " 'serious, perhaps irreparable consequence' " flowing from interlocutory orders,³¹ the court failed to find any potential harm resulting from a grant or denial of a stay of arbitration serious enough to justify immediate appeal.

In the court's view, the only harm created by a grant of stay is the possibility of a "needless trial of the preliminary issue."³² The only potential harm flowing from a denial of a stay of arbitration is that the ensuing arbitration may later be held void upon confirmation.³³ Though these consequences might be unpleasant, they are not of the " 'serious, perhaps irreparable' " nature that Congress

29. 297 F.2d 80 (2d Cir. 1961), *cert. denied sub nom.*, *Dawson v. Lummas Co.*, 368 U.S. 986 (1962).

30. *Id.* at 86. The court refused to give "broad literal interpretation" to the word "injunction." *Id.*

31. *Id.* at 85-86 (citing *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)).

The proposition that the statutory exceptions to the rule of finality were created to permit appeal in instances that threaten "serious, perhaps irreparable consequence" was first enunciated by the Supreme Court in *Baltimore Contractors*, one of the *Enelow-Ettelson* progeny. See *supra* note 12. The case held that a district court's refusal to stay an accounting action pending arbitration was not a refusal of an injunction within § 1292(a)(1). *Baltimore Contractors*, 348 U.S. at 184-85. The proposition has been widely invoked. *E.g.*, *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186-87 (1st Cir. 1972). It has also been dismissed as an inconclusive test, since many of the instances in which circuit courts refuse to entertain appeals of district court orders involve such consequences. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3922, 30 (1977). For example, "[t]he general rule is that orders granting, denying, or dissolving temporary restraining orders are not appealable under § 1292(a)(1)." *Id.* at 31.

Another concern with the use of the *Baltimore Contractors* test in this area develops from the fact that, since *Baltimore Contractors* dealt with an order staying court proceedings pending arbitration, the Court there was not addressing an injunction per se, which seeks to control the activities of litigants outside of the courtroom, but was instead concerned with a court monitoring its own house. The language, therefore, should not be given controlling weight in the area of stays of arbitration.

32. *Lummas*, 297 F.2d at 86.

33. *Id.*

sought to allay by implementing section 1292(a)(1).³⁴ Thus, the court reasoned, the word "injunctions" in section 1292(a)(1) must be accorded a narrow interpretation to bar appeal of grants and denials of stays of arbitration.³⁵

The court also noted a second policy concern in support of the court's holding: appeals from denials of stays of arbitration would tend to impede one of the main purposes of arbitration—the speedy resolution of conflict.³⁶ Thus, the arbitration process is perceived as best served by barring appeals of denials.³⁷

The rationale in *Lummus* was reinforced in *Greater Continental Corp. v. Schechter*.³⁸ This time the Second Circuit was presented with an order denying a stay of arbitration.³⁹ The court reiterated its conclusion that denials and grants of stays of arbitration are not injunctions within the meaning of section 1292(a)(1).⁴⁰ The court returned to the rationales offered in *Lummus* in support of its conclusion.⁴¹ First, a primary reason parties contractually provide for arbitration is to obtain speed of proceedings.⁴² According to the court, appeals from orders denying stays of arbitration would impede this purpose by delaying the arbitration process.⁴³

Secondly, the court noted that an arbitration decision is not automatically enforceable; enforcement requires further judicial action.⁴⁴ Thus, the court alludes that the party seeking to avoid arbitration is not permanently barred from the courts and may yet challenge the arbitration during the confirmation proceedings. This

34. *Id.*

35. *Id.*

36. See S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924); United States Arbitration Act, Pub. L. No. 401, 43 Stat. 883 (1925) ("The desire to avoid the delay and expense of litigation persists . . . 'in contrast with the long time required by the courts with their congested calendars to settle a dispute . . . the average arbitration required but a single, and occupied but a few hours.' " (quoting N.Y. Times, May 11, 1924)). Cf. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 103 S. Ct. 929, 941 (1983) (Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements").

37. *Lummus*, 297 F.2d at 86. The Second Circuit's statement concerning the "baneful effect" on speed of arbitration has been strongly criticized. See *Buffler v. Electronic Computer Programming Inst.*, 466 F.2d 694, 698 (6th Cir. 1972), where the Sixth Circuit was "unable to see how arbitration proceedings are necessarily delayed when an appeal is taken from a District Court's order denying a stay of those proceedings. Presumably the arbitration goes forth untouched." *Id.*

38. 422 F.2d 1100 (2d Cir. 1970).

39. *Id.* at 1101.

40. *Id.* at 1102.

41. *Id.* at 1102-03.

42. *Id.* at 1102.

43. *Id.*

44. *Id.* at 1102-03.

is in keeping with the court's reasoning in *Lummus* that the possible harm resulting from a voided arbitration is not serious enough to justify the application of section 1292(a)(1). Based on its desire to protect the speed of arbitration, and its confidence in the requirement that arbitration proceedings must be judicially confirmed, the court concluded that the denial of a stay of arbitration was not appealable under section 1292(a)(1).⁴⁵

The rationales and holdings of *Lummus* and *Greater Continental* were affirmed in *Diematic Manufacturing Corp. v. Packaging Industries*.⁴⁶ *Diematic*, like *Lummus*, presented an attempted appeal of a granted stay of arbitration.⁴⁷ The court summarily reiterated that an order staying arbitration is not an injunction within the meaning of section 1292(a)(1) and refused to hear the appeal, citing its prior holdings.⁴⁸

2. *The Third and Eighth Circuits: Will They Follow?*

Two other circuits have adopted the Second Circuit's analysis in cases considering appeals from orders *denying* stays of arbitration. The Third Circuit in *Stateside Machinery Co. v. Alperin*,⁴⁹ held that such an order was not appealable under section 1292(a)(1).⁵⁰ The court surveyed decisions of the other circuits concerning stays of arbitration and found that "the reasoning of the First and Second Circuits has more to commend it."⁵¹ Though the court admitted that the motion at issue sought "what is in form an injunction,"⁵² it concluded that section 1292(a)(1) was not designed to encompass appeals of such motions.⁵³ As justification, the court reasoned that any harm resulting from denial of a motion to stay arbitration is not irreparable and does not justify the appeal of the denial under section 1292(a)(1).⁵⁴

Even though *Stateside Machinery* involved an appeal of a denial

45. *Id.* The court also stated that the "nonappealability of orders granting or denying a stay of arbitration does not depend upon the old distinction between law and equity," *Id.* at 1102.

46. 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975).

47. *Id.* at 976.

48. *Id.* at 977 (citing *Lummus* and *Greater Continental*).

49. 526 F.2d 480 (3d Cir. 1975).

50. *Id.* at 485.

51. *Id.* at 483.

52. *Id.*

53. *Id.* at 484.

54. *Id.* at 483-84. The only possible harm found was the cost incurred in an arbitration proceeding which may be set aside upon judicial review. That injury, according to the court, was "not the kind of injury against which § 1292(a)(1) is intended to guard." *Id.* at 484. This

of a stay, the Sixth Circuit recently cited the case as an indication that the Third Circuit has adopted a blanket rule against appealability of all stay orders.⁵⁵ This conclusion is premature until the Third Circuit actually subscribes to blanket nonappealability in a case presenting an appeal of a grant staying arbitration, since it did not take the opportunity to reveal its inclination in *Stateside Machinery*. Although it expressed approval of the reasoning of the First and Second Circuits regarding denials of stays of arbitration, it also recognized without disclaimer that the First Circuit utilizes a hybrid approach and permits appeals of grants of stays of arbitration.⁵⁶ Thus, even though *Stateside Machinery* incorporated the Second Circuit's reasoning, it cannot be conclusively stated that the Third Circuit disallows appeals from grants of stays of arbitration.

The Eighth Circuit has also approved the Second Circuit's rationale regarding denials of stays of arbitration in *Mellon Bank v. Pritchard-Keang Nam Corp.*⁵⁷ The court there concluded that an order denying a stay of arbitration is not an appealable interlocutory order under section 1292(a)(1).⁵⁸ The court relied on two policy considerations to support its conclusion. First, it noted the strong federal policy against piecemeal litigation,⁵⁹ which it considered a mandate to examine interlocutory appeals "with an eye toward a finding of non-appealability."⁶⁰ Secondly, the court stated that the policy of favoring bargained-for arbitration agreements to settle contract disputes required that it closely scrutinize interlocutory appeals.⁶¹ Based on these policy concerns, the court opted to follow the First, Second, and Third Circuits in holding that an order denying a stay of arbitration is not appealable under section

echoes the Second Circuit's conviction that "'serious, perhaps irreparable consequence[s]" do not flow from such interlocutory orders. *Lummus*, 297 F.2d at 86.

55. *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363, 367 (6th Cir. 1984). The Sixth Circuit also misapprehended the Eighth Circuit's position regarding the appealability of grants of stays of arbitration. See *infra* note 64 and accompanying text.

56. *Stateside Mach.*, 526 F.2d at 483 n.6.

57. 651 F.2d 1244 (8th Cir. 1981).

58. *Id.* at 1250.

59. Piecemeal litigation results when a trial is interrupted by repeated appeals of interlocutory orders. Fragmenting the trial in this manner, besides delaying the case and providing an opportunity for one party to harass the other, may force the trial court to repeatedly refamiliarize itself with the case or to impanel a new jury and start again. See Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961).

60. *Pritchard-Keang*, 651 F.2d at 1249 (citing *Switzerland Cheese Ass'n. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966); *In re World Tradeways Shipping, Ltd.*, 373 F.2d 860, 862 (2d. Cir.), *cert. denied*, 389 U.S. 901 (1967).

61. *Pritchard-Keang*, 651 F.2d at 1249.

1292(a)(1).⁶²

The Eighth Circuit is in a position analogous to that of the Third Circuit in that it has not been confronted with an appeal from a grant of a stay. In fact, the court expressly reserved the question of whether it would accept such an appeal.⁶³ This reservation seems to contradict its express approval of the Second Circuit's holding in *Greater Continental*, since the Eighth Circuit still has the option to allow appeals from grants of stays of arbitration.⁶⁴

Thus, only the Second Circuit has completely embraced the rule of blanket nonappealability.⁶⁵ Although the Third and Eighth Circuits have approved and adopted the Second Circuit's reasoning with respect to *denials* of stays, neither has ruled on the appealability of a *grant* of a stay of arbitration.⁶⁶ All other circuit courts which have been presented with an appeal from a grant of a stay have accepted the appeal.⁶⁷ This consistency seems to indicate that the arguments for nonappealability of grants of stays of arbitration lack persuasiveness. It is, therefore, possible that the Third and Eighth Circuits will follow the others and leave the Second Circuit as the lonely champion of its blanket rule.⁶⁸

62. *Id.* at 1250.

63. *Id.* at 1250 n.6. Though reserving consideration, the court referred to the Sixth Circuit's opinion in *Buffler v. Electronic Computer Programming Inst.*, 466 F.2d 694 (6th Cir. 1972), which allowed the appeal of such an order. The *Buffler* court reasoned that the grant of a stay of arbitration effectively deprives one party of the "relatively inexpensive and expeditious means by which the parties agreed to resolve disputes," since even if the dispute eventually reaches arbitration, the parties have already gone through the expense and delay of litigation which they sought to avoid in the first instance. *Buffler*, 466 F.2d at 698.

64. The Sixth Circuit assumed prematurely that the Eighth Circuit would follow the Second Circuit's lead in refusing to hear appeals of grants of stays of arbitration. *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363, 367 (6th Cir. 1984). The Sixth Circuit made the same assumption with regard to the Third Circuit's position. See *supra* note 55 and accompanying text.

65. See *supra* notes 27-48 and accompanying text.

66. See *supra* notes 49-64 and accompanying text.

67. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419 (9th Cir. 1984); *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525 (5th Cir. 1983); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977); *Buffler*, 466 F.2d 694 (6th Cir. 1972).

68. Such action would also be consistent with legal commentary on the subject, which generally criticizes the blanket rule. Two commentators who have specifically addressed this issue have criticized the Second Circuit's approach. One author has argued that the Second Circuit's refusal to hear appeals of grants of arbitration stays is suspect because the policy advanced to support the court's position applies to denials, but not grants, staying arbitration. Note, *Appeal of Arbitration Orders*, *supra* note 5, at 173. While orders denying stays of arbitration do indeed speed the arbitration process, orders granting stays do not. *Id.* So the policy of enabling the parties to realize the bargained-for benefits of arbitration is not served by turning away appeals of grants of stays of arbitration. *Id.*

The Second Circuit has also been criticized for attempting to effectuate a policy which

3. *Criticism of the Blanket Rule*

There are two basic arguments which can be advanced against the blanket rule. The first is based purely on statutory construction.⁶⁹ The language of section 1292(a)(1) explicitly allows appeals of orders granting or denying injunctions. A motion for a stay of arbitration is a request for the court to intervene and halt activities extraneous to the judicial proceedings. This seems to have the effect of an injunction, and it satisfies one analyst's definition.⁷⁰ Indeed, the Ninth Circuit has called this "the classic form of injunction."⁷¹ The Third Circuit in *Stateside Machinery* also seemed to acknowledge that a denial of a stay of arbitration is an injunction.⁷² If such orders are injunctions, then section 1292(a)(1) provides appellate jurisdiction in the courts of appeals without further inquiry.

The second argument against the blanket rule is that it is not actually justified by effectuation of the policy concerns outlined in

ought instead to be addressed by Congress. Comment, *Arbitration or Litigation?*, 1973 U. ILL. L.F. 338, 345-46 (1973).

69. Statutory analysis is to "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1979) (construing the Consumer Product Safety Act, 15 U.S.C. § 2055 (1982)). A statute's passage reflects legislative policy balancing against which the court should not weigh policies of its own.

70. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3922, 29. Section 1292(a)(1) "injunctions" are "orders that are directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." *Id.* (citing *International Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963)). The authors caution, however, that the meaning of the word "injunctions," as used in the statute, is difficult to state affirmatively. *Id.* at 29. In fact, they acknowledge an exception to the rule: orders of specific performance, which satisfy the definition, are not appealable under § 1292(a)(1). *Id.* at 30.

An attempt to classify orders in a manner which fulfills the statutory purpose of preventing "serious, perhaps irreparable consequence" is even more futile. *Id.* (citing *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). See also *supra* note 31. A number of orders which threaten such consequence have not been classified as injunctions within the meaning of § 1292(a)(1). Examples include temporary restraining orders and "orders designed to control the procedural conduct of litigation." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3922, 30.

71. *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 713 (9th Cir. 1968). See 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3923, 58 n.28 (citing *Plastik Pak* as the "most influential decision" supporting the obvious conclusion that motions seeking stays of arbitration are injunctions within the meaning of § 1292(a)(1)).

72. *Stateside Mach.*, 526 F.2d at 483. The Third Circuit refused to hear the appeal of what it admitted was arguably an injunction, because it failed to find sufficient potential harm to justify the application of § 1292(a)(1). *Id.* at 484. See *supra* note 54 and accompanying text.

Greater Continental.⁷³ The Sixth Circuit persuasively expressed this argument in *Buffler v. Electronic Computer Programming Institute*,⁷⁴ noting first that the blanket rule does not necessarily facilitate speedy dispute resolution.⁷⁵ The court also took issue with the implication that orders granting or denying stays of arbitration do not result in "serious, perhaps irreparable, consequence."⁷⁶ When a grant of a stay of arbitration is not appealable, one party is forced to spend time and money in litigation when arbitration was the proper course. The court found this loss of time and money to be a permanent, serious, and irreparable harm, since even if the claims were ultimately arbitrated, the advantages of arbitration are gone forever.⁷⁷ The court concluded that this consequence required appealability under section 1292(a)(1).⁷⁸

The Second Circuit's approach to the appealability of orders granting or denying stays of arbitration is the least credible because it ignores the language of section 1292(a)(1). Also, neither of the two rationales which it offers as justification reflects the realities of arbitration. When the Third and Eighth Circuits are eventually presented with appeals of grants of stays of arbitration, they are likely to take jurisdiction under section 1292(a)(1). Not only did these circuits leave this option open, and not only is the most recent trend among the circuits to allow such appeals,⁷⁹ but the arguments for appealability are the most persuasive. In the future, the Second Circuit will likely be alone in following the blanket rule against appealability.

73. See *supra* text accompanying notes 43-45.

74. 466 F.2d 694 (1972).

75. *Id.* at 698. See *supra* note 37.

76. *Buffler*, 466 F.2d at 698 (citing *Baltimore Contractors*, 348 U.S. at 181). See *supra* notes 31, 63.

77. The court stated that parties usually agree to arbitrate disputes because arbitration is an "inexpensive and expeditious means" to resolve disputes. *Buffler*, 466 F.2d at 698-99.

78. *Id.* There is some dispute regarding whether this harm analysis is required under § 1292(a)(1). See *infra* notes 101-05 and accompanying text.

79. Three circuits considered the issue in 1984, and all three concluded that orders granting stays of arbitration are appealable under § 1292(a)(1). *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419 (9th Cir. 1984) (an order denying a stay of arbitration not appealable because harm which results is not irreparable; however, an order granting a stay of arbitration causes irreparable harm and is thus appealable); *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515 (7th Cir. 1984) ("an order refusing, as opposed to an order granting, a stay of arbitration is not appealable under § 1292(a)(1)"); *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363 (6th Cir. 1984) (an order denying a stay of arbitration is not appealable in the Sixth Circuit, following the First Circuit's hybrid solution which allows appeal of orders granting stays of arbitration while not allowing appeals of orders denying them). *Alascom* and *Timberlake* were both decided on March 9, 1984, just nine days after *North Supply*.

B. *Appealability as a Matter of Right*

Several circuits have determined that both denials and grants of stays of arbitration are appealable under section 1292(a)(1). The first to announce a rule of universal appealability was the Ninth Circuit. In *A. & E. Plastik Pak Co. v. Monsanto Co.*,⁸⁰ the court agreed to hear an appeal of a denial for a stay of arbitration, holding that section 1292(a)(1) confers jurisdiction.⁸¹ The court based its conclusion upon a determination that orders concerning stays of arbitration are clearly injunctions, and therefore the grant or refusal of such a stay is encompassed by section 1292(a)(1).⁸² The court reiterated its position on across-the-board appealability in *Power Replacements, Inc. v. Air Preheater Co.*,⁸³ where it again agreed to hear an appeal of an order denying a motion for stay of arbitration proceedings.⁸⁴

The most recent Ninth Circuit pronouncement was in 1984 in *Alascom, Inc. v. ITT North Electric Co.*⁸⁵ For the first time, the appeal before the court was from a grant of a stay of arbitration.⁸⁶ The court cited *Plastik Pak* in holding that grants, like denials, of stays of arbitration are appealable under section 1292(a)(1).⁸⁷ The court felt compelled, however, to justify its conclusion more extensively than it had done in *Plastik Pak* in light of an intervening Supreme Court case,⁸⁸ *Carson v. American Brands, Inc.*⁸⁹

In *Carson*, the Court found that section 1292(a)(1) conferred appealability over an interlocutory order denying entry of a consent decree.⁹⁰ The Court admitted that the practical effect of the order was a denial of an injunction,⁹¹ but decreed that practical effect alone is not enough to make an order appealable under section

80. 396 F.2d 710 (9th Cir. 1968).

81. *Id.* at 713.

82. *Id.* The Ninth Circuit did not debate whether the word "injunctions," as used in § 1292(a)(1), could have a narrower, more specific meaning than its common meaning, but analyzed whether the order at issue was an injunction in the commonly understood sense of the word. "[T]he court was asked . . . affirmatively to interfere with proceedings in another forum; to exercise its equity powers to halt action of its litigants outside of its own court proceedings—the classic form of injunction." *Id.*

83. 426 F.2d 980 (9th Cir. 1970).

84. *Id.* at 982-83.

85. 727 F.2d 1419 (9th Cir. 1984).

86. *Id.* at 1420.

87. *Id.* at 1422.

88. *Id.*

89. 450 U.S. 79 (1980).

90. *Id.* at 88-89.

91. *Id.* at 83.

1292(a)(1).⁹² As a prerequisite to appealability under section 1292(a)(1), the Court required a showing that the order at issue threatened a “‘serious, perhaps irreparable consequence’” which could only be “‘effectually challenge[d]’” by immediate appeal.⁹³

Because of *Carson*, the Ninth Circuit did not continue to rely solely on its plain meaning interpretation of section 1292(a)(1) to justify taking jurisdiction over the appeal. Instead, it proceeded to decide whether the order threatened serious, irreparable harm. Applying the *Carson* standard in *Alascom*, the Ninth Circuit distinguished between the potential harm caused by denying an appeal of a stay of arbitration and the harm caused by refusing an appeal of a denial of a stay.⁹⁴ The court held that any harm resulting from the latter is not irreparable, because the award obtained through the forced arbitration must be approved by the district court.⁹⁵ If the issue is found to be nonarbitrable upon review, the court may refuse to enforce the award.⁹⁶ More serious harm is allegedly incurred when an order grants a stay of arbitration, since, once a party is forced to “undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever.”⁹⁷ It was this “serious, perhaps irreparable consequence,” which motivated the Ninth Circuit to hold that the order staying arbitration is appealable under section 1292(a)(1).⁹⁸

The Ninth Circuit's partial reanalysis of *Plastik Pak* creates doubt that it will continue to allow appeals from orders denying stays of arbitration. It may join those circuits which apply a hybrid solution.⁹⁹

Although the application of *Carson* has been championed by

92. *Id.* at 84. The Court seems disinclined to apply the plain meaning rule to § 1292(a)(1), since this reasoning appears to be at odds with the plain language of the statute. For a possible explanation, see *infra*, notes 101-05 and accompanying text.

93. *Carson*, 450 U.S. at 84 (citing *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)); see also *supra* note 31.

94. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

95. 9 U.S.C. § 9 (1982).

96. *Alascom*, 727 F.2d at 1422. This familiar rationale was promoted by the Second Circuit to justify nonappealability of orders denying stays. See *supra* notes 44-45 and accompanying text.

97. *Alascom*, 727 F.2d at 1422 (citing *Buffler v. Electronic Computer Programming Inst.*, 466 F.2d 694, 698 (6th Cir. 1972)). The *Alascom* court's reference to *Buffler* perhaps indicates that the type of harm which concerned the court was the qualitative harm of lost time which the parties originally sought to avoid by agreeing to arbitrate their disputes. See *supra* notes 77-78 and accompanying text.

98. *Alascom*, 727 F.2d at 1422.

99. See *infra* notes 117-63 and accompanying text.

one commentator,¹⁰⁰ it is questionable whether *Carson* should be cited for the proposition that proof of irreparable harm is required to validate appealability of orders concerning stays of arbitration. One legal scholar suggests that the *Carson* standard is limited in application to interlocutory orders which have the *practical effect* of an injunction, and does not extend to injunctions "in terms."¹⁰¹ His interpretation of *Carson* is that it extends section 1292(a)(1) appealability to those interlocutory orders which do not refuse a formal injunction. Instead, if the order has the "*practical effect* of refusing an injunction" (emphasis added) it may be appealable, but only upon an additional showing of "serious, perhaps irreparable consequence[s]" that can be effectually challenged only by immediate appeal.¹⁰² In *Carson*, the district court refused to approve a consent decree which was not, in form, an "interlocutory order . . . granting . . . or refusing [an] injunction."¹⁰³ Since, however, it had the same effect as an injunction, the Court developed this additional, higher standard to create the possibility of appeal. Thus, the standard which the Supreme Court announced in *Carson* only limits the appealability of those orders which are not explicitly injunctions.¹⁰⁴ This additional hurdle should not apply, however, when an injunction is specifically requested, and appeal is taken from the order granting or refusing the injunction. Under those circumstances, section 1292(a)(1) does not permit an inquiry into the nature of potential harm.

A motion to stay arbitration is a request for an injunction in terms, as several courts and commentators have concluded.¹⁰⁵ Inquiry into the *Carson* standards, therefore, is not required to justify the application of section 1292(a)(1), since the section explicitly applies. In conclusion, the *Alascom* opinion is the only circuit court decision which credits *Carson* with altering the requirements of appealability for orders granting or denying stays of arbitration—an incorrect interpretation of *Carson*.

The Fifth Circuit has also adopted the rule of appealability as a matter of right.¹⁰⁶ It has held that both denials and grants of stays

100. See Note, *Appeal of Arbitration Orders*, *supra* note 5, at 168-72.

101. C. WRIGHT, *supra* note 6, at § 102, 709.

102. *Id.*

103. *Carson v. American Brands, Inc.*, 450 U.S. 79, 85 (1981) (citing 28 U.S.C. § 1292(a)(1) (1982)).

104. See C. WRIGHT, *supra* note 6, at § 102, 709.

105. See *supra* notes 70-72 and accompanying text.

106. *E.g., Texaco, Inc. v. American Trading Trans. Co.*, 644 F.2d 1152 (5th Cir. 1981) (order granting a stay of arbitration is an appealable interlocutory order under § 1292(a)(1));

of arbitration are appealable interlocutory orders under section 1292(a)(1), although it has not provided rationales for its decisions.¹⁰⁷ The Fifth Circuit last examined the issue in late 1983,¹⁰⁸ and again held that the grant of a stay of arbitration was appealable.¹⁰⁹ Since it did not apply or even acknowledge the *Carson* standard, its adoption of appealability as a matter of right appears to be unequivocal.

Finally, the Eleventh Circuit has indicated that it is inclined to adopt the rule of blanket appealability.¹¹⁰ It has not had an opportunity, however, to apply its choice of solutions.

It appears that the rule of blanket appealability may be in a state of transition. The Ninth Circuit, which has historically been the primary supporter of the rule,¹¹¹ has recently hesitated in its support.¹¹² However, the Ninth Circuit's doubt concerning its well-settled rule appears to be misguided.¹¹³ If that court adopts the hybrid approach to appealability¹¹⁴ when given the opportunity, only the Fifth Circuit, and also possibly the Eleventh, will allow appeals from both grants and denials of stays. Because these circuits have not discussed any competing interests when holding that the orders are appealable as a matter of right,¹¹⁵ it is doubtful that they will consider any arguments contrary to their decisions in the future. The waning support for the rule of blanket appealability is

Petroleum Helicopters, Inc. v. Boeing-Vertol Co., 606 F.2d 114 (5th Cir. 1979) (order refusing to stay arbitration also appealable under § 1292(a)(1)).

107. See *Texaco*, 644 F.2d at 1154; *Petroleum Helicopters*, 606 F.2d at 114.

108. *City of Meridian v. Algernon Blair Inc.*, 721 F.2d 525 (5th Cir. 1983).

109. *Id.* at 529.

110. See *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365 (11th Cir. 1983). The Eleventh Circuit in *Pitney Bowes* was presented with an attempted appeal from an order denying a stay of arbitration. *Id.* at 1373. The court did not allow the appeal for procedural reasons, but did indicate summarily that it would have exercised jurisdiction but for the procedural defects. *Id.* at 1373-75. Its willingness to assume jurisdiction over an appeal of a stay of arbitration demonstrates that the Eleventh Circuit will ultimately choose the rule of blanket appealability, since it is the only one which allows the appeal of denials of stays. Those circuits which have chosen a hybrid solution find that denials of stays are not appealable, although grants of stays are. See text accompanying notes 117-18.

111. Courts and commentators generally recognized the Ninth Circuit's analysis in *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968), as the point of reference for the rule of complete appealability. See, e.g., *Buffler v. Electronic Computer Programming Inst.*, 466 F.2d 694, 699 (6th Cir. 1972); *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186 (1st Cir. 1972); Note, *Appeal of Arbitration Orders*, *supra* note 5, at 172; Comment, *Arbitration or Litigation?*, *supra* note 68, at 340.

112. See *supra* notes 88-99 and accompanying text.

113. See *supra* notes 101-05 and accompanying text.

114. See *infra* notes 117-63 and accompanying text.

115. See *supra* notes 107-10 and accompanying text.

regrettable, because it is the rule most consistent with the language of section 1292(a)(1). Simply, orders concerning stays of arbitration are injunctions and, therefore, must be appealable as a matter of right under section 1292(a)(1).¹¹⁶

C. A Hybrid Solution

The most recent developments in this area indicate a trend toward permitting appeals of orders staying arbitration, yet disallowing appeals of orders denying stays. This hybrid solution was initially adopted by the First Circuit in 1972.¹¹⁷ The First Circuit was the lone supporter of the hybrid solution until 1984, when the Sixth and Seventh Circuits expressly adopted that approach.¹¹⁸

In *New England Power Co. v. Asiatic Petroleum Corp.*,¹¹⁹ the First Circuit set forth its reasons for utilizing this hybrid solution. The appeal was from a district court order denying a motion for stay of arbitration.¹²⁰ The appellate court had previously held that an order enjoining arbitration was appealable,¹²¹ but in *New England Power* it found that an order denying such a stay required different treatment.¹²² It determined that such a denial did not have an adverse impact on the ultimate rights of the parties of the sort resulting from stays of arbitration.¹²³ This was a fatal weakness for an order appealed pursuant to section 1292(a)(1) because the court viewed the statute as a narrow exception to the finality rule.¹²⁴ The court based this view on the teachings of *Baltimore Contractors, Inc. v. Bodinger*,¹²⁵ stating that an appeal could only be made under section 1292(a)(1) if the appellant met the now familiar "serious,

116. See *infra* notes 164-95 and accompanying text.

117. *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183 (1st Cir. 1972). *New England Power* involved a denial of a stay. Previously, the First Circuit had summarily taken jurisdiction over an appeal of a grant of stay of arbitration in *Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960).

118. *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363 (6th Cir. 1984); *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515 (7th Cir. 1984). Both courts, within a period of nine days, decided that denials of motions for stays of arbitration are not appealable, while affirming prior decisions which held grants of such motions to be appealable. See *supra* note 63. The Ninth Circuit, in an opinion released within the same nine-day period, hinted that in the future it might abandon its rule of blanket appealability and adopt the hybrid rule. See *supra* notes 95-99 and accompanying text.

119. 456 F.2d 183, 186-87 (1st Cir. 1972).

120. *Id.* at 184.

121. *Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915 (1st Cir. 1961).

122. *New England Power*, 456 F.2d at 186.

123. *Id.*

124. See *id.* at 188-89.

125. 348 U.S. 176 (1955).

perhaps irreparable harm" test.¹²⁶ The appellant in *New England Power* failed to convince the court that prohibition of the appeal would result in such harm; therefore, the court held that the denial was not appealable.¹²⁷ Its conclusion was buttressed by its desire to effectuate the congressional policies favoring arbitration.¹²⁸

The Seventh Circuit adopted the hybrid approach in *Timberlake v. Oppenheimer & Co.*,¹²⁹ where the court diverged from its prior analysis regarding stays of arbitration. Until 1984 it was one of the few courts which utilized the *Enelow-Ettelson* doctrine to determine appealability of orders involving stays of arbitration.¹³⁰ In *Timberlake*, however, it examined the decisions of the other circuits and concluded that refusals to stay arbitration are not appealable under section 1292(a)(1).¹³¹ The Seventh Circuit has twice held that grants of stays of arbitration are appealable.¹³²

The court noted that the language of section 1292(a)(1) does not explicitly provide for a hybrid treatment, yet found that the distinction between grants and denials is permissible.¹³³ In the court's view, appeals of stays may expedite arbitration, whereas appeals of denials of stays only impose burdens on the arbitration process.¹³⁴ The policies of promoting speedy dispute resolution through arbitration and discouraging tactical litigative delays, therefore, justify the hybrid approach.¹³⁵

The Sixth Circuit has also recently adopted the hybrid approach. Since its 1972 decision in *Buffler v. Electronic Computer Programming Institute*,¹³⁶ the Sixth Circuit has consistently permit-

126. *New England Power*, 456 F.2d at 186-87 (citing *Baltimore Contractors*, 348 U.S. at 181); see *supra* note 31.

127. *New England Power*, 456 F.2d at 187.

128. *Id.* at 186.

129. 729 F.2d 515 (7th Cir. 1984).

130. See *Whyte v. THinc Consulting Group Int'l*, 659 F.2d 817, 819 (7th Cir. 1981).

131. *Timberlake*, 729 F.2d at 519.

132. *Weissbuch v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833 (7th Cir. 1977); *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 614 (7th Cir. 1973).

133. *Timberlake*, 729 F.2d at 519.

134. *Id.*

135. *Id.* The court also cited Note, *Appeal of Arbitration Orders*, *supra* note 5, which argues for the hybrid approach, relying mainly on the *Carson* standards. Thus, the court implicitly adopted *Carson's* application to stays of arbitration. *Id.*

Displaying a concern for outcome consistency, which is unusual in this area of the law, the court noted that its holding provides for consistent results despite procedural distinctions. See *id.* Since orders to arbitrate are not appealable in the Seventh Circuit, *Timberlake's* holding that a denial of a stay of arbitration is also unappealable means that arbitration must proceed regardless of the procedural setting.

136. 466 F.2d 694 (6th Cir. 1972).

ted appeals of orders granting stays of arbitration. The court rejected the Second Circuit's rule of blanket nonappealability as unworkable, especially with respect to grants of stays.¹³⁷ Without expressly embracing either approach, the court recognized that both the First and Ninth Circuits would permit appealability.¹³⁸ It merely held that the order granting the stay of arbitration was appealable under section 1292(a)(1).¹³⁹ This left unresolved the issue of whether a denial of a stay is also appealable.

Although the court did not expressly indicate its choice of a rule governing denials of stays, it implicitly favored the Ninth Circuit's reasoning over that of the First Circuit. It noted that the First Circuit's hybrid solution cannot be squared with the language of section 1292(a)(1), which allows appeals equally from interlocutory orders "granting [or] . . . refusing . . . injunctions."¹⁴⁰ The court instead expressed approval of the Ninth Circuit's statement supporting blanket appealability, which labeled orders involving stays of arbitration as "the classic form of injunction."¹⁴¹ It added that the reasoning of the Ninth Circuit is consistent with the policies underlying *Baltimore Contractors*.¹⁴² Thus, the Sixth Circuit seemed prepared to follow the Ninth Circuit and allow blanket appealability.¹⁴³

*North Supply Co. v. Greater Development & Services Corp.*¹⁴⁴ presented the Sixth Circuit with an appeal of an order denying a

137. *Id.* at 698. See *supra* notes 76-78 and accompanying text for further explanation of the critique in *Buffler*.

138. *Buffler*, 466 F.2d at 699.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 699 n.6. Notwithstanding its reliance on *Baltimore Contractors*, the *Buffler* court did not believe that appealability is governed by the *Enelow-Ettelson* doctrine. On the contrary, the court stated:

[n]either the theory nor the mechanics of the *Enelow-Ettelson* rule are applicable when the proceedings which are sought to be enjoined are not pending before the court in which the equitable claim is asserted but rather those proceedings are in fact pending in a separate tribunal such as arbitration.

Id. at 697-98 n.4. The *Buffler* court, however, interpreted *Baltimore Contractors*' objective when applying the *Enelow-Ettelson* rule to be "to allow appeals under section 1292(a)(1) from those interlocutory orders which could be said to grant or deny injunctions against proceedings in another tribunal." *Id.* at 699 n.6. The *Buffler* court, therefore, found support in *Baltimore Contractors* for total appealability of stays.

143. Shortly after the *Buffler* decision, one commentator characterized the Sixth Circuit as having adopted a blanket allowance of appealability. See Comment, *Arbitration or Litigation?*, *supra* note 68, at 338.

144. 728 F.2d 363 (6th Cir. 1984).

stay of arbitration.¹⁴⁵ In a split decision, the court held that such a denial was not appealable under section 1292(a)(1).¹⁴⁶ The court first discussed the reasoning and holdings of the First, Second, and Ninth Circuits,¹⁴⁷ noting that the *Buffler* decision precluded adoption of the Second Circuit approach.¹⁴⁸ Left with a choice between the First Circuit's hybrid solution or the Ninth Circuit's rule of blanket appealability, the court concluded that "the First Circuit's approach embodies the better view."¹⁴⁹ The court's sole justification for choosing the hybrid solution was that it protects the strong policies favoring arbitration and disfavoring piecemeal litigation.¹⁵⁰

The Sixth Circuit did not return to its *Buffler* analysis, except to note that it clearly rejected the Second Circuit's blanket nonappealability approach.¹⁵¹ Because its dictum in *Buffler* was implicitly contrary to its holding in *North Supply*,¹⁵² it is questionable whether the *North Supply* court was free to adopt the hybrid approach without further explanation.¹⁵³ In *North Supply*, the court cited with approval the First Circuit's contention that "whether an injunction is 'classic' or not does not resolve the question of appealability when strong countervailing policies are involved."¹⁵⁴ The *Buffler* court, however, had approved the Ninth Circuit's view that orders concerning stays of arbitration are "the classic form of injunction" and therefore appealable under section 1292(a)(1).¹⁵⁵ This contradic-

145. *Id.* at 364.

146. *Id.* at 368.

147. *Id.* at 366-68. The court also analyzed the Seventh Circuit's decisions, characterizing that circuit as having applied the *Enelow-Ettelson* doctrine to the issue of stays of arbitration. *Id.* at 367. Although this characterization was correct at the time, it is no longer accurate. See *supra* notes 129-35 and accompanying text.

148. *North Supply*, 728 F.2d at 368.

149. *Id.*

150. *Id.*

151. See *id.*

152. See *supra* notes 136-43 and accompanying text.

153. There is a Sixth Circuit rule that "[o]nly an en banc court may overrule a circuit precedent, absent an intervening Supreme Court decision." *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984). This rule effectuates a policy of deference for previous decisions of Sixth Circuit panels. Although the *North Supply* court was not bound by the reasoning of *Buffler*, and *North Supply* did not constitute an overruling of *Buffler*, *North Supply* shattered the expectation, created by *Buffler*, that the Sixth Circuit would adopt blanket appealability. The policy of deference which underlies the Sixth Circuit's rule of en banc reversal dictates that the *North Supply* panel should have provided more substantial support for its about-face.

154. *North Supply*, 728 F.2d at 367 (citing *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186 (1st Cir. 1972)).

155. *Buffler*, 466 F.2d at 699 (citing *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 713 (9th Cir. 1968)).

tion illustrates the *North Supply* majority's implicit disagreement with the court's *Buffler* rationale.

The *North Supply* court did not rely on or mention the *Carson* analysis.¹⁵⁶ Apparently, the court did not require any showing of "serious, perhaps irreparable consequence" in order for an injunction to be appealable under section 1292(a)(1).¹⁵⁷

The cumulative effect of *North Supply*, *Timberlake* and *Alascom, Inc. v. ITT North Electric Co.*,¹⁵⁸ is a clear trend favoring the hybrid solution. The First, Sixth and Seventh Circuits have expressly adopted this approach for several reasons.

The First Circuit interpreted section 1292(a)(1) as a very narrow exception to the finality rule and the policy against piecemeal litigation.¹⁵⁹ It therefore only permits appeals if the appellant can show that "serious, perhaps irreparable" harm would result from denial of an appeal.¹⁶⁰ The court also reasoned that the hybrid approach would protect the policies in the United States Arbitration Act.¹⁶¹ The Seventh Circuit also relied on deference to arbitration, as first proposed by Judge Friendly in *Lummus*, and may also have been influenced by the *Carson* decision.¹⁶² Finally, the Sixth Circuit followed the lead of the First Circuit and cited the federal policies in favor of arbitration and against piecemeal appeals as the reasons for its decision.¹⁶³

It remains to be determined whether this hybrid approach, the blanket rule of nonappealability, or appealability as a matter of right is the proper solution.

II. THE BETTER VIEW?

The federal courts of appeals have developed three solutions to a difficult issue of appellate jurisdiction. Careful analysis is required to determine which solution is best. Factors which must be considered include the language of section 1292(a)(1), the practice of weighing policy concerns against the statutory language, and the practical effects of each solution. After analysis of each of the three

156. See *supra* notes 89-93 and accompanying text.

157. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). *Contra Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419 (9th Cir. 1984). See also text accompanying notes 89-98 (*Alascom* analysis of *Carson*).

158. 727 F.2d 1419 (9th Cir. 1984).

159. See *New England Power*, 456 F.2d at 186.

160. *Id.* at 186-87.

161. *Id.* at 186 (discussing policies of 9 U.S.C. § 1 (1982)).

162. See *supra* text accompanying notes 133-35.

163. See *supra* text accompanying notes 149-50.

approaches, this Note concludes that appealability as a matter of right is the proper solution to the issue of appealability of stays of arbitration.

A. *The Statute Does Not Support the Hybrid Approach*

The language of section 1292(a)(1) specifically permits appeals of “[i]nterlocutory orders of the district courts . . . granting . . . [or] refusing . . . injunctions.”¹⁶⁴ The decisive question is whether an order concerning a motion for a stay of arbitration is an injunction. If it is, then section 1292(a)(1) provides for appealability, regardless of whether the order grants or refuses the stay motion. If a stay of arbitration is not an injunction, then appealability under this section is precluded. There is no statutory indication that the appealability of an interlocutory order is conditioned upon whether the order grants or denies an injunction.

The clear language of the statute, therefore, does not support the hybrid approach. Recognizing this problem, a leading federal procedure treatise notes that little attention has been given to the anomalous position of “characterizing an order granting a stay as an injunction, but simultaneously characterizing an order denying a stay as not denying an injunction.”¹⁶⁵

In the Sixth Circuit decision adopting the hybrid solution,¹⁶⁶ the language of section 1292(a)(1) was one basis for the dissent.¹⁶⁷ The dissent contended that the only question under the statute is whether the relief sought in the district court is injunctive.¹⁶⁸ If it is, then the district court order is appealable as an interlocutory order.¹⁶⁹ This contention is well-founded, especially in the Sixth Circuit, since the court previously questioned whether the hybrid approach could be squared with the statutory language.¹⁷⁰ This concept was ignored by the majority when it chose the hybrid approach.¹⁷¹

164. 28 U.S.C. § 1292(a)(1) (1982).

165. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3923, 65.

166. *North Supply v. Greater Dev. & Servs. Corp.*, 728 F.2d 363 (6th Cir. 1984).

167. *Id.* at 368-69 (Kennedy, J. dissenting).

168. *Id.* at 369.

169. *Id.*

170. *Bufler v. Electronic Computer Programming Inst.*, 466 F.2d 694, 699 (6th Cir. 1972).

171. See *supra* notes 151-55 and accompanying text.

B. *Policy Concerns Are Implicitly Addressed in the Statute*

The statutory language not only prohibits inquiry into whether the stay was granted or denied but also discourages policy balancing. When the district court grants or refuses an injunction, the inquiry ends. However, both the hybrid approach and the blanket rule against appealability are grounded in policy rationales which were balanced against the language of section 1292(a)(1).

It is true that there is an underlying tension between the finality rule and the granting of interlocutory appeals. The finality rule is based on the federal policy of avoiding the inefficiency and inconvenience of piecemeal appeals,¹⁷² while certain interlocutory appeals are necessary to avoid injustices which might result from delay.¹⁷³ Congress balanced these competing interests when it created statutory exceptions to the finality rule to allow certain types of interlocutory appeals.¹⁷⁴ In enacting section 1292(a)(1), Congress determined that when a district court order grants or refuses an injunction, the considerations favoring interlocutory appeal outweigh the policies underlying the finality rule. Congress, therefore, left no room for ad hoc balancing of policy concerns in appeals involving injunctions. If a stay of arbitration is an injunction, then the grant or denial of that stay is appealable without further inquiry.

Both the circuits which support blanket nonappealability and those which have adopted the hybrid rule overlook the fact Congress has already weighed the policy concerns. Their approaches evolved from their own analyses of the various policy considerations.

One rationale which has been advanced is the irreparable harm standard first stated in *Baltimore Contractors, Inc. v. Bondinger*,¹⁷⁵ and later elaborated in *Carson v. American Brands, Inc.*¹⁷⁶ The Second Circuit used this standard to determine that disallowance of appeals of orders concerning stays of arbitration does not produce sufficient harm to confer jurisdiction.¹⁷⁷ The Ninth Circuit has questioned whether the standard stated in *Carson* will require it to

172. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, at § 3907, 429.

173. C. WRIGHT, *supra* note 6, at § 101, 698.

174. See *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 n.3 and accompanying text (1950).

175. 348 U.S. 176 (1955).

176. 450 U.S. 79 (1981).

177. See *Lummas Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 85-86 (2d Cir. 1960), *cert. denied*, 368 U.S. 986 (1962).

stop accepting appeals from denials of stays.¹⁷⁸ There are strong arguments that neither case applies to appeals of stays.¹⁷⁹ Even if *Baltimore Contractors* and *Carson* were applicable, they would not operate to nullify appeals. *Carson* states that section 1292(a)(1) was intended to be only a limited exception to the policy against piecemeal litigation.¹⁸⁰ When a court characterizes appeals of stay denials as not harmful enough to qualify under the *Baltimore Contractors/Carson* standard, it is implicitly protecting judicial efficiency.¹⁸¹ If, however, an immediate appeal is not permitted, and the arbitration goes forward, it is likely that the arbitration decree will subsequently be challenged in litigation and possibly overturned. What efficiency has been gained? It is arguably more efficient to immediately hear the appeal and avoid possible future litigation expense and time.

Also, the courts frequently balance policy concerns against the statute to reach a result contrary to the plain meaning of the statute. For example, the Sixth Circuit's decision in *North Supply v. Greater Development & Services Corp.*,¹⁸² was based entirely on a balancing approach. The court stated that whether an order is an injunction or not "does not resolve the question of appealability when strong countervailing policies are involved."¹⁸³ It deemed that the strong federal policies favoring arbitration and disfavoring piecemeal litigation were just such countervailing policies.¹⁸⁴ No justification was offered, however, for the court's balancing of policies against the clear language of section 1292(a)(1).

There is no basis for weighing the policy favoring arbitration against the language of section 1292(a)(1). This statute was first adopted in 1891 as part of an Act of Congress creating the circuit courts of appeals.¹⁸⁵ This was long before Supreme Court decisions

178. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

179. See *supra* notes 31, 101-04 and accompanying text.

180. 450 U.S. at 84.

181. This raises the possibility of another incorrect justification for the hybrid approach. By treating appeals from denials and grants of stays differently, the circuits have eliminated a set of apparently valid appeals from their dockets. This type of docket reduction in the name of judicial efficiency is analogous to that found in the abstention area. See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17, *reh'g. denied*, 426 U.S. 912 (1976). Despite the possible benefits of reducing appellate court dockets, the courts cannot disregard a clearly applicable statute.

182. 728 F.2d 363 (6th Cir. 1984).

183. *Id.* at 368.

184. See *id.*

185. Act of March 3, 1891, ch. 517, 26 Stat. 828. Section 7 of the Act authorized the courts of appeals to review a small class of non-final orders granting or continuing injunctions.

which heralded the federal policy favoring arbitration.¹⁸⁶ At no time has Congress or the Supreme Court suggested that the plain statutory language of section 1292(a)(1) should be balanced against the interests of arbitration. Even if strong policy reasons suggest that balancing is appropriate, the appellate courts may not alter the operation of a clearly applicable statute.¹⁸⁷

The courts also may not use the federal policy of avoiding piecemeal litigation in a balancing test to support the hybrid approach. Although this policy should be weighed against the rights asserted in an interlocutory appeal, Congress has already done this very same balancing. Congress has determined that, if the appeal is from an order concerning an injunction, the rights of an appellant outweigh the policy against piecemeal litigation. There is no additional balancing to be done.

Although the *North Supply* decision is based upon the First Circuit's approach,¹⁸⁸ the Sixth Circuit did not completely embrace its analysis. The decision in *North Supply* was solely based on balancing, whereas the First Circuit's analysis used balancing to supplement the serious harm test of *Baltimore Contractors*.¹⁸⁹ *Baltimore Contractors*, however, does not provide for a balancing analysis under section 1292(a)(1). Although it considered the federal policy involved in reviewing appealability of interlocutory orders, the case was governed by the *Enelow-Ettelson* doctrine and is therefore not dispositive of appealability of injunctions specifically encompassed by the statute.¹⁹⁰ Thus, *Baltimore Contractors* cannot stand for the proposition that policy considerations are to be balanced against the language of section 1292(a)(1).

If no balancing inquiry is permitted under section 1292(a)(1), the sole determination is whether a stay of arbitration is an injunction. If it is, grants or refusals of stays are automatically appealable

186. *E.g.*, the Steelworkers Trilogy: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

187. Several courts have held that, although orders denying stays are indeed injunctions, the plain language of the statute does not apply because of strong policy reasons. *See New England Power v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186-87 (1st Cir. 1972); *North Supply Co. v. Greater Dev. & Servs. Corp.*, 728 F.2d 363, 367 (6th Cir. 1984). *See also Dyk, supra* note 26.

188. "We believe the First Circuit's approach embodies the better view." *North Supply*, 728 F.2d at 368.

189. *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186-87 (1st Cir. 1972) (citing *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). *See also supra* note 31.

190. *See supra* notes 12 and 126.

under the statute. This Note asserts that stays of arbitration are injunctions. A leading federal procedure treatise notes that "[m]ost courts have adopted the obvious conclusion that an order prohibiting arbitration is an injunction."¹⁹¹ Even the courts which adopt the hybrid approach implicitly recognize that such stays are injunctions; otherwise, they could not assert that grants of the stays are appealable under section 1292(a)(1). Stays of arbitration do indeed fit a general definition of injunction: an order enjoining proceedings in another tribunal.¹⁹² Orders prohibiting a party from pursuing action in another court or before an administrative body have always been considered injunctions appealable under section 1292(a)(1).¹⁹³ Aside from policy considerations, there is no reason to distinguish between proceedings before those tribunals and proceedings before an arbitral tribunal. The rule, therefore, should be: an order enjoining or refusing to enjoin action before any tribunal is appealable as an order granting or denying an injunction under section 1292(a)(1).

C. *Blanket Appealability Produces the Better Result*

Since the statutory language and the various rationales of the courts have been examined, the remaining factor to consider is the practical impact of the approaches. Appealability as a matter of right would produce the most predictable, consistent, and just results in all procedural settings. The hybrid approach, on the other hand, produces different results in similar situations, depending upon the procedural history of the suits.¹⁹⁴

The impact of the two rules is illustrated by the following scenario. If a party refuses to arbitrate, two events might occur. The first possibility is that the party desiring arbitration will request an order compelling arbitration. If that order is granted, the opposing party may appeal it under either the hybrid approach or appealability as a matter of right.¹⁹⁵ The second possibility is that the opposing party will seek a stay of arbitration. If the opposing party's request is denied, the denial is appealable only under the rule of appealability

191. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3923, 58.

192. A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 713 (9th Cir. 1968).

193. United States v. Dorgan, 522 F.2d 969, 971 n.1 (8th Cir. 1975), *aff'd. mem.*, 429 U.S. 953 (1976); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 31, at § 3923, 48.

194. North Supply Co. v. Greater Dev. & Servs. Corp., 728 F.2d 363, 369 (6th Cir. 1984) (Kennedy, J., dissenting).

195. *Id.*

as a matter of right. Under the hybrid approach, it would not be appealable, even though the appeal would have the same practical effect as in the first scenario. The appellant would be deprived of rights solely on the basis of procedural happenstance.

Clearly, appealability as a matter of right is the better rule if it avoids this type of injustice. The federal rule of appealability should not be left open to the circumstance of procedure. If an interlocutory appeal is deemed worthy of jurisdiction in one procedural setting, it should be equally worthy in another.

Furthermore, the blanket rule of nonappealability creates greater injustice. All appellants, whether from grants or denials of stays, are denied the rights Congress secured for them in section 1292(a)(1). There is no justification for completely ignoring the plain statutory language and general definitions of injunctions.

Appealability as a matter of right is the proper solution for this issue. It is the only approach consistent with the language of section 1292(a)(1). It produces consistent results under varying procedural settings. All appellants are provided with the rights Congress secured for them. Lastly, the other approaches are ill-founded and do not justify divergence from the statutory language.

III. CONCLUSION

The appealability of orders granting or denying stays of arbitration is far from resolved. Three approaches have developed for considering such appeals. The blanket rule of nonappealability¹⁹⁶ appears to be the least appropriate solution.¹⁹⁷ The hybrid approach has recently gained in popularity.¹⁹⁸ Various rationales are advanced for its adoption. The First Circuit was largely persuaded by *Baltimore Contractors* and was concerned with protecting the policies of arbitration as an additional rationale.¹⁹⁹ The Seventh Circuit also seemed to be concerned with the *Carson* decision.²⁰⁰ The Sixth Circuit mainly relied on a balancing test, weighing countervailing policies against the language of section 1292(a)(1) to support its acceptance of the hybrid approach.²⁰¹ Another indication of the trend toward the hybrid approach is the opinion in *Alascom*, which suggests that the Ninth Circuit will adopt the hybrid ap-

196. See *supra* notes 29-44 and accompanying text.

197. See *supra* notes 65-79 and accompanying text.

198. See *supra* notes 117-63 and accompanying text.

199. See *supra* text accompanying notes 123-27, 189-90.

200. See *supra* notes 129-35 and accompanying text.

201. See *supra* notes 183-84 and accompanying text.

proach when next presented with an appeal from a denial of stay.²⁰²

The rule of appealability as a matter of right is the third approach. It was initially promoted by the Ninth Circuit²⁰³ and has been embraced by two other circuits.²⁰⁴ Although it may have recently lost some support, this approach is the proper solution to the issue of appealability of orders concerning stays of arbitration. This approach is the most consistent with the language of section 1292(a)(1).²⁰⁵ It also does not undermine the governing statute by balancing policy interests against application of the statute.²⁰⁶ Lastly, appealability as a matter of right produces the most consistent results in different procedural settings.²⁰⁷ In conclusion, the most appropriate answer to the question of whether grants or denials of stays of arbitration are appealable is to permit appealability as a matter of right under section 1292(a)(1).

J. BRET TREIER

202. *See supra* notes 85-99 and accompanying text.

203. *See supra* notes 80-84 and accompanying text.

204. *See supra* notes 106-09 and accompanying text.

205. *See supra* notes 164-71, 191-93 and accompanying text.

206. *See supra* notes 185-90 and accompanying text.

207. *See supra* notes 194-95 and accompanying text.